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In the Supreme Court of the United States

DENNIS BATES, ET AL., PETITIONERS

v.

DOW AGROSCIENCES LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempts petitioners' state tort claims alleging that application of respondent's herbicide damaged petitioners' peanut crops.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. The United States submits that the court of appeals correctly ruled that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, preempts petitioners' state law tort claims. That decision, which is consistent with the largely uniform rulings of other federal courts of appeals and state courts of last resort, and turns on the characteristics of the particular state-law claims at issue, does not warrant this Court's review.

STATEMENT

Respondent Dow Agrosciences LLC filed suit in the United States District Court for the Northern District of Texas against petitioners Dennis Bates, et al., in anticipation that petitioners would bring a state court action alleging that

their application of respondent's herbicide, Strongarm, damaged their peanut crops. The district court granted respondent summary judgment, holding that FIFRA preempts most of petitioners' state tort claims and that the remaining claims are barred by product label disclaimers. Pet. App. 21a-31a. The court of appeals affirmed, ruling that FIFRA preempts all of petitioners' claims without reaching the effect of the label disclaimers. *Id.* at 1a-20a.

A. The Federal Insecticide, Fungicide, And Rodenticide Act

Congress created FIFRA through a series of enactments to regulate the labeling, sale, and use of pesticides, including herbicides. See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, see ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Ibid.* See Federal Environmental Pesticide Control Act of 1972 (1972 Amendments), Pub. L. No. 92-516, 86 Stat. 973. In addition, Congress "regulated the use, as well as the sale and labeling, of pesticides" and granted the Environmental Protection Agency (EPA), which had previously been charged with federal oversight of pesticide programs, "increased enforcement authority." *Mortier*, 501 U.S. at 601. The 1972 Amendments effectively "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ibid.* (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. See, *e.g.*, Federal Pesticide Act of 1978 (1978 Amendments), Pub. L. No. 95-396, 92 Stat. 819; Food Quality Protection Act of 1996 (1996 Amendments), Pub. L. No. 104-170, Tit. II, 110 Stat. 1489.

FIFRA directs EPA to register pesticides for particular uses and to approve pesticide labels. 7 U.S.C. 136a. FIFRA provides that EPA "shall register a pesticide" if the agency determines, in light of any restrictions placed on the pesticide's use:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. 136a(c)(5). EPA has promulgated regulations detailing the registration requirements. See 40 C.F.R. Pt. 152 *et seq.*

Based on its experience following the 1972 Amendments, EPA reported to Congress that the agency's obligation to evaluate efficacy claims in the registration process was diverting scarce resources needed to evaluate environmental and health effects. Congress responded in the 1978 Amendments, providing:

> In considering an application for the registration of a pesticide, the Administrator [of EPA] may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

7 U.S.C. 136a(c)(5). As a consequence of the 1978 Amendments, EPA's regulations governing registration of pesticides now state:

> The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot readily be observed by the user including, but not limited to, microorganisms infectious to man in any area of the inanimate environment or a claim to control vertebrates (such as rodents, birds, bats, canids, and skunks) that may directly or indirectly transmit diseases to humans. However, each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration.

40 C.F.R. 158.640(b)(1); see 40 C.F.R. 158.540; 47 Fed. Reg. 53,192 (1982); 44 Fed. Reg. 27,932, 27,938 (1979) (col. 3). In addition to the requirement that registrants develop and maintain efficacy data, EPA requires the registrant, after a pesticide has been registered, to report incidents of known harm to non-target organisms, such as crops, if the pesticide label does not provide adequate notice of the risk of such harm. 40 C.F.R. 159.184(a)(1)-(3), (b)(3) and (4).

FIFRA's regulatory program encourages federal-state cooperation in regulating pesticides. See *Mortier*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," sets out key principles of that relationship. See 7 U.S.C. 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. 136v(a). Nevertheless, to ensure a uniform nationwide approach to pesticide labeling, Section 136v(b) provides a specific limitation on a State's authority with respect to the content of pesticide labeling:

> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. 136v(b). Section 136v(c)(1) further provides that a State shall have the power, subject to various limitations, to allow additional uses of federally registered pesticides within the individual State's borders:

> **(c) Additional uses**
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or cancelled by the Administrator. * * *

7 U.S.C. 136v(c)(1). Section 136v(c)(2) through (4) sets out additional limitations on state-issued registrations. 7 U.S.C. 136v(c)(2)-(4).

In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration. A State may not, however, "impose * * * any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. 136v(b).

B. Factual Background And Proceedings Below

Petitioners are twenty-nine Texas peanut farmers who claim that respondent's Strongarm herbicide product harmed their crops. Pet. App. 1a-2a. Under the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. § 17.505(a) (West 2002), plaintiffs seeking judicial relief must give the defendant sixty days' notice before bringing suit. In their notice letters to respondent, petitioners stated that, unless respondent provided compensation, petitioners would bring suit for false advertising, breach of warranty, and fraudulent trade practices under the DTPA. Pet. App. 3a. Before the notice period elapsed, respondent filed suit against petitioners in federal district court. Alleging diversity jurisdiction, respondent sought a declaratory judgment that: (1) all of petitioners' state law claims were preempted by FIFRA; (2) petitioners' remedies were limited to the purchase price of Strongarm because of a paragraph titled "Limitation of Remedies" on the Strongarm label; and (3) petitioners' warranty claims were barred by a "Warranty Disclaimer" paragraph on the label. Petitioners filed counterclaims alleging negligence, breach of implied and express warranties, fraud in the inducement, defective design, estoppel, and waiver. *Ibid.*

The district court granted summary judgment for respondent. Pet. App. 21a-31a. The court ruled that FIFRA preempted petitioners' negligence and warranty claims

because those claims, at bottom, challenged the statements that respondent placed on the Strongarm label. *Id.* at 25a-26a, 30a. The court also held that FIFRA preempted petitioners' fraud claims because those claims were based on alleged statements of respondent's employees and distributors that merely repeated information appearing on the Strongarm label. *Id.* at 27a-28a. Finally, the district court ruled that petitioners' implied warranty claims and petitioners' claims based on alleged oral statements of respondent's employees and distributors that went beyond the label statements were barred by the express disclaimers that respondent placed on the Strongarm label. *Id.* at 26a-27a, 28a-30a.

The court of appeals affirmed. The court first rejected contentions that it lacked subject matter jurisdiction because the claims of some of the petitioners did not meet the amount-in-controversy requirement of 28 U.S.C. 1332(a). Pet. App. 3a-5a. The court of appeals next rejected the argument that the district court abused its discretion by not abstaining from exercising jurisdiction in favor of a state court action brought by petitioners. *Id.* at 4a-5a, 8a.[1]

The court of appeals then turned to the question of federal preemption. The court concluded that this case turns on whether Section 136v(b) of FIFRA, which expressly preempts "any requirements for labeling or packaging in addition to or different from those required" by FIFRA, 7 U.S.C. 136v(b), expressly preempts petitioners' state law claims. Pet. App. 9a-11a. The court specifically rejected petitioners' arguments that "state labeling requirements related to product effectiveness are not within the scope of FIFRA's express preemption clause," *id.* at 11a, and that the particular claims at issue here are not subject to express preemption because they "are not sufficiently related to the

[1] Petitioners do not seek this Court's review of those issues.

content of the Strongarm label," *ibid.* See *id.* at 12a-15a, 15a-19a.

The court rejected petitioners' contention that FIFRA does not preempt product efficacy claims, as opposed to product safety claims. Section 136v(b) expressly preempts "any requirement for labeling," without reference to the subject matter of the labeling requirement, that is "in addition to or different from" what FIFRA requires. Pet. App. 12a-13a. The court specifically noted that "FIFRA's text does not define the scope of FIFRA's preemption clause to be a function of existing EPA regulations." *Id.* at 13a. The court was not persuaded to the contrary by petitioners' citation of *American Cyanamid Co.* v. *Geye*, 79 S.W.3d 21 (Tex. 2002), cert. denied, 123 S. Ct. 2637 (2003), in which the Texas Supreme Court ruled that FIFRA does not preempt certain state law claims respecting crop damage because EPA does not generally evaluate product efficacy. Pet. App. 14a. The court of appeals explained:

> We find *Geye* unhelpful because it did not address the principal issue: whether the scope of FIFRA's express preemption clause includes product effectiveness claims which relate to product labeling. *Geye* holds only that the specific Texas state-law claims for crop damage did not present a problem of conflict preemption under the applicable EPA regulations. In other words, *Geye* proceeds from the assumption that the claims at issue did not relate to product labeling and that FIFRA's express preemption clause did not apply.

Ibid. The court reasoned that Section 136v(b) expressly preempts any state court action that would result in imposing a labeling requirement "in addition to or different from" (7 U.S.C. 136v(b)) a product label that received EPA approval under FIFRA, regardless of whether EPA evaluated product efficacy. Pet. App. 14a-15a.

The court of appeals next considered whether Section 136v(b) preempted the specific claims at issue by examining "whether a judgment against [respondent] would cause it to need to alter the Strongarm label." Pet. App. 16a. See *id.* at 15a-19a. The court concluded that Section 136v(b) preempted petitioners' breach of warranty and fraud-related claims because those claims were predicated on alleged "off label" representations that did not differ in "any material manner" from the Strongarm label. *Id.* at 16a-17a. Imposing liability would, as a practical matter, force respondent to alter its label. *Ibid.* The court concluded that Section 136v(b) preempted petitioners' defective design and negligence claims because each was "a disguised claim for failure to warn" that, if successful, would similarly force respondent to change its label. *Id.* at 18a-19a.

DISCUSSION

The court of appeals correctly ruled that FIFRA expressly preempts petitioners' state law claims alleging that respondent's herbicide damaged their crops. The court properly recognized that Section 136v(b) preempts state law causes of action that would subject a pesticide to labeling requirements "in addition to or different from" the FIFRA-required label. The court evaluated petitioners' specific claims and concluded that each of those claims, if successful, would require respondent to change the contents of its FIFRA-required label.

FIFRA's preemption requirements have generated a substantial amount of litigation. Contrary to petitioners' contentions, however, generally the courts have developed a consistent and coherent approach to resolving preemption claims. This case does not present any square conflict of fundamental importance requiring this Court's review. To the contrary, this case turns largely on the characteristics of petitioners' particular state law claims, which present the

very threat to uniform labeling requirements that led Congress to include an express preemption provision within FIFRA. Those claims, if successful, would require respondent, who obtained a product label by complying with FIFRA's requirements, to change its label to avoid future liability.

A. FIFRA Preempts Petitioners' State-Law Damages Claims

The court of appeals "has addressed the scope of § 136v(b) many times." Pet. App. 10a (citing *Hart* v. *Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000); *Andrus* v. *Agrevo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *MacDonald* v. *Monsanto*, 27 F.3d 1021 (5th Cir. 1994)). Its past decisions have recognized that "FIFRA does not completely preempt all state or local regulation of pesticides," and "FIFRA does not preempt common law that is unconcerned with herbicide labeling," but "FIFRA preempts state laws that either directly or indirectly impose different labeling requirements." *Id.* at 10a-11a. The court noted that it is "well-established that [Section 136v(b)'s] term 'any requirements' encompasses both positive state enactments as well as common-law causes of action." *Id.* at 11a n.8.

The court of appeals explained that petitioners sought to distinguish their state-law claims for judicial relief on the ground that "product effectiveness claims, even those that impose a labeling requirement, are not within the scope of FIFRA's express preemption clause." Pet. App. 12a. The court correctly rejected that distinction. Section 136v(b) expressly preempts "any requirements for labeling" that are "in addition or different from" those that FIFRA imposes. 7 U.S.C. 136v(b). It therefore preempts inconsistent labeling requirements, whether imposed through state legislation, state agency rules, or a state court's articulation of common law standards of care. Under Section 136v(b)'s plain text,

EPA's decision not to require manufacturers to submit efficacy information as part of the registration process is not relevant to the scope of FIFRA's express preemption.

The court of appeals' conclusion that Section 136v(b) generally preempts label-related state tort actions rests on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which held that provisions of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. 1331 *et seq.* proscribing the imposition of any "requirement or prohibition * * * under State law" (see *Cipollone*, 505 U.S. at 515), encompasses not only state statutes and regulations, but also legal duties applied in common-law tort actions. Pet. App. 12a & n.11; see, *e.g.*, *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("There is no notable difference between the language in the 1969 Cigarette Act [preempting state common-law tort actions based on label claims] and the language in FIFRA.").

The court's conclusion finds further support in this Court's decision in *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). The Court ruled in *Medtronic* that the Food and Drug Administration's (FDA's) approval of a pacemaker under the Medical Device Amendments of 1976 (MDA), Pub. L. No. 94-295, 90 Stat. 539 (21 U.S.C. 301 *et seq.*), did not, under the particular circumstances presented, preempt a state-law action alleging that the pacemaker was improperly designed. Five Justices in that case recognized, however, that the MDA's provisions prohibiting the States from establishing any inconsistent "requirement" that "relates to the safety or effectiveness of the device," 21 U.S.C. 360k(a)(2), could preempt state-law damage suits. See 518 U.S. at 504 (Breyer, J., concurring in part); *id.* at 510-512 (O'Connor, J., concurring in part and dissenting in part).

The court of appeals correctly adhered to *Cipollone* and *Medtronic* in concluding that a Texas state court's application of a legal standard in a state-law damages action

may "impose" "requirements for labeling" (7 U.S.C. 136v(b)). In this Court, petitioners do not take issue with the court of appeals' conclusion that the state law claims at issue here would impose such requirements insofar as they would compel respondents to change the label that they obtained through the FIFRA approval process. See Pet. 28-29 (noting, without disputing, the court of appeals' characterization of "each of the claims as label-related and as 'inducing' the manufacturer to change its label or product"). Thus, the only question is whether Section 136v(b)'s express preemption of state-law damage actions that impose labeling requirements excludes damage actions based on product efficacy.

Section 136v(b)'s unqualified text does not exempt from preemption state-law damages actions based on product efficacy. Petitioners nevertheless urged the court of appeals to create such an exemption on the basis of the Texas Supreme Court's decision in *American Cyanamid Co.* v. *Geye*, *supra*, which also involved a dispute over whether FIFRA preempted state law claims challenging an herbicide's efficacy. The Texas Supreme Court ruled:

> Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops its was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under FIFRA, we conclude that state common-law claims about area crop damage are not preempted.

79 S.W.3d at 23. The Texas Supreme Court misunderstood EPA's perspective and practices on the subject of product

efficacy.[2] But setting that error to one side, the court of appeals correctly concluded that the Texas Supreme Court gave insufficient attention to the plain language of Section 136v(b), which expressly states the scope of FIFRA's preemption. Pet. App. 14a.

The court of appeals correctly concluded that EPA's general practice of not independently evaluating product efficacy data is irrelevant to Section 136v(b)'s express preemption inquiry. Congress's 1978 Amendments to FIFRA relieved EPA of any obligation to require registrants to submit efficacy data, but it did not relieve registrants of their obligation to submit accurate labeling for approval in the registration process, 7 U.S.C. 136a(c)(5)(B) (including accurate directions for use, see 40 C.F.R. 156.10(i)), or immunize registrants from FIFRA's penalties for false or misleading labeling, 7 U.S.C. 136j(a)(E); see 40 C.F.R. 156.10(a)(5). The 1978 Amendments also left unchanged the plain terms of Section 136v(b), which prohibit a State from imposing "any requirements" that are "in addition to or different from" the FIFRA requirements. 7 U.S.C. 136v(b).[3]

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[2] Contrary to the Texas Supreme Court's premise in *Geye*, EPA has not abandoned all regulation of product efficacy. EPA continues to require manufacturers to develop and maintain data supporting their efficacy claims. 40 C.F.R. 158.640(b)(1); 40 C.F.R. 158.540. Manufacturers must provide EPA with this data if the agency so requests. *Ibid.* Manufacturers must also report to EPA when they learn that their products have harmed non-target organisms such as crops or persons, if the label does not provide adequate notice of the risk of such harm. 40 C.F.R. 159.184(a)(1). Generally, EPA does not independently evaluate a registrant's product efficacy claims pertaining to agricultural pesticides. For some agricultural products, however, EPA continues to take efficacy into account, albeit in a circumscribed manner, in the registration process. See note 5, *infra*.

[3] Petitioners also rely on EPA Pesticide Regulation Notice (PR) 96-4 (Pet. 4, 11), but that guidance document does not purport to resolve the question at issue here. That document makes clear that, under the

In short, notwithstanding the 1978 Amendments, Section 136v(b) continues to preempt any state-imposed requirements that would add to or subtract from the label for which the registrant obtains approval through the FIFRA registration process. 7 U.S.C. 136v(b). Section 136v(b)'s proscription continues to prohibit a State from requiring the registrant to change the directions for use or to include additional or different product efficacy statements on the label, regardless of whether or not EPA evaluates product efficacy claims in the registration process.

B. The Court Of Appeals' Decision Does Not Give Rise To A Conflict Warranting This Court's Review

Petitioners urge this Court to grant review on the assertion that the many federal and state court decisions addressing FIFRA preemption have created a "jurisprudential mare's nest." Pet. 3, 12. To the contrary, the decision in this case is consistent with a large and generally consistent body of authority holding that FIFRA preempts state-law causes of action, like the claims at issue here, that would require a registrant who has received EPA approval of its

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general registration procedures addressed in that notice, EPA had waived review of the efficacy of agricultural pesticides in the registration process. See PR 96-4 (June 3, 1996) <http://www.epa.gov/opppmsd1/PR_Notices/pr96-4.html>. Accordingly, EPA explained, some courts in FIFRA preemption cases had erred in basing their decisions on the erroneous "premise that, in approving labels for agricultural pesticides, EPA examines, or at least has the obligation to examine, the efficacy of the pesticide and related issues such as the potential for the pesticide to cause property damage." *Ibid.* But PR 96-4 did not express a view on the proper interpretation of the text of FIFRA's preemption provision, nor did it set forth EPA's views regarding the extent to which FIFRA preempts causes of action predicated on the inaccuracy or insufficiency of efficacy claims in an EPA-approved label. *Ibid.* See Letter from Jonathan Z. Cannon, General Counsel, EPA, to Douglas T. Nelson, General Counsel, American Crop Protection Ass'n (Nov. 14, 1996). PR 96-4 is therefore irrelevant to this case.

label under FIFRA to change that label to avoid future liability. Petitioners have constructed elaborate characterizations of the reasoning of the various decisions (Pet. 19-27), but those constructions, whether accurate or not, overlook that the federal and state courts have held, with near uniformity, that FIFRA preempts the types of state law claims that petitioners present in this case.[4]

Petitioners suggest a conflict of authority based primarily on the tension between the court of appeals' decision in this case and the Texas Supreme Court's decision in *Geye*. As *Geye* itself acknowledges, the Texas Supreme Court had previously ruled, in the context of a personal injury suit, that "FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling." 79 S.W.3d at 29 (quoting *Quest Chem. Corp.* v. *Elam*, 898 S.W.2d 819, 820 (Tex. 1995)). The Texas Supreme Court's decision in *Geye*, however, created an exception in the case of state-law claims based on product efficacy. *Ibid.*

Petitioners' alleged conflict accordingly rests on the relatively narrow issue of whether Section 136v(b) preserves from preemption, sub silentio, state-law causes of action that

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[4] As respondent points out (Br. in Opp. 7, 15-16 n.13), nine federal courts of appeals have held that FIFRA expressly preempts state-law based claims that challenge a product's label. See, *e.g.*, Pet. App. 10a-11a; *Grenier* v. *Vermont Log Bldgs. Inc.*, 96 F.3d 559 (1st Cir. 1996); *Hawkins* v. *Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Lowe* v. *Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Kuiper* v. *American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998); *Netland* v. *Hess & Clark Inc.*, 284 F.3d 895 (8th Cir.), cert. denied 537 U.S. 949 (2002); *Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199 (9th Cir. 2002); *Arkansas-Platte & Gulf P'ship* v. *Van Waters & Rogers, Inc.*, 959 F.2d 158, aff'd after remand, 981 F.2d 1177 (10th Cir. 1992), cert. denied, 510 U.S. 813 (1993); *Lowe's Home Ctrs., Inc.* v. *Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002). Eighteen state supreme courts have reached the same result. See Br. in Opp. 16-17 n.15

challenge a label's claims respecting the use and effectiveness of the labeled product. The Texas Supreme Court stands alone in carving out such an exception, and it did so through an interlocutory decision in a case in which there is some uncertainty whether the state law claims at issue actually challenged the content of the label. See U.S. Amicus Br. at 9, 11-12, in *American Cyanamid Co.* v. *Geye*, cert. denied, 123 S. Ct. 2637 (2003) (No. 02-367).

It is unclear, moreover, whether the issue deemed so critical to the *Geye* court—a perceived lack of EPA regulation regarding efficacy concerns—is even presented in this case. The Texas Supreme Court predicated its rejection of FIFRA preemption in *Geye* on its view that "Congress authorized the EPA in 1978 to choose not to require the submission of data relating to the 'efficacy' of products." 79 S.W.3d at 25. The court noted that "EPA has chosen not to collect data concerning target area phytotoxicity" and, accordingly, "[w]ith respect to target area phytotoxicity, the EPA makes no review." *Id.* at 25, 29. In this case, however, respondent *did* submit efficacy data to EPA as a prerequisite for EPA's expedited review of Strongarm under 7 U.S.C. 136a(c)(10). See Br. in Opp. 2, 5.[5] Thus, unlike the situation in *Geye*, the registrant submitted efficacy data for EPA review, albeit not in the context of label approval. It is

[5] Congress authorized that review procedure, described in 7 U.S.C. 136a(c)(10), through the 1996 Amendments to FIFRA, which sought to encourage manufacturers to develop pesticides that posed reduced threats to human health and the environment. See Pub. L. No. 104-170, Tit. II, § 250(2), 110 Stat. 1511. EPA set out the review process in PR 97-3 (Sept. 4, 1997), which requires registrants to submit, among other information, "Comparative Performance Data" or efficacy data. EPA requests that information to allow it to determine whether "risk reduction has a reasonable opportunity to be accomplished by adoption of the new pesticide by growers." PR 97-3, Section § VII(G). See <http://www.epa.gov/opppmsd1/PR_Notices/pr97-3.html>.

unclear how the Texas Supreme Court would rule on the preemption issue in these circumstances.[6]

Although the apparent tension between the reasoning of the *Geye* decision and the decision below may necessitate further review at some point, it would be appropriate for this Court to await a case in which the issue is squarely presented. At present, the disagreement between the numerous federal courts of appeals that have recognized that Section 136v(b) broadly preempts state-law causes of action relating to product labels, and a single state supreme court that has recently carved out an exception for product efficacy claims that no other court has followed, does not present a conflict of sufficient breadth, depth, or duration to warrant this Court's review. If the tension between the federal and state appellate courts in Texas ultimately develops into a direct and recurring conflict, this Court's intervention may be called for at that time.

Petitioners also assert (Pet. 19-21, 24-25) that the court of appeals' decision conflicts with one federal court of appeals decision, *Ferebee* v. *Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984), and two state supreme court decisions, *Sleath* v. *West Mont. Home Health Servs., Inc.*, 16 P.3d 1042, 1051-1053 (Mont. 2000), cert. denied, 534 U.S. 814 (2001), and *Gorton* v. *American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), cert. denied, 516

[6] The position of the United States, as explained in this brief, is that state tort claims based on a lack of efficacy that would, in effect, require the registrant to add to or subtract from the pesticide label in order to avoid liability are preempted regardless of whether EPA receives or reviews efficacy data in a particular case. Under a proper reading of Section 136v(b), the question whether EPA received or reviewed efficacy data is irrelevant to the express preemption inquiry. The United States has identified that question in this case solely for the purpose of explaining why it is not clear that the Texas Supreme Court would have applied its reasoning in *Geye* to the facts presented here.

U.S. 1067 (1996). Those decisions, however, do not present any conflict warranting this Court's review.

The D.C. Circuit's 1984 decision in *Ferebee* does not present a live conflict. The court of appeals stated in that decision that the term "requirements," as used in Section 136v(b), preempts only positive state law and not tort actions. *Ferebee*, 736 F.2d at 1540-1541. The D.C. Circuit decided that case, however, before this Court's decision in *Cipollone*. While the D.C. Circuit has not expressly overruled *Ferebee*, it has since recognized that the term "requirements" is properly understood as encompassing common law actions for damages. In *Waterview Management Co.* v. *FDIC*, 105 F.3d 696 (D.C. Cir. 1997), the court has described *Cipollone* as "explaining that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted." *Id.* at 699.

The Wisconsin Supreme Court's decision in *Gorton* also does not present a conflict. The state supreme court held that FIFRA did not preempt the plaintiffs' negligent misrepresentation claim in that case, which rested on written and oral representations respecting an herbicide that differed from those on the product label, because that claim did not "challenge the labeling of a manufacturer's product." 533 N.W.2d at 755. See *ibid.* ("All of the statements assuring that [the herbicide] was 'safe' and 'extremely safe' had no relation to the labeling or packaging of the herbicide."). The court's decision in *Gorton* is accordingly distinguishable from this case, in which the court of appeals held that all of petitioners' claims were sufficiently related to the Strongarm label to require preemption. Pet. App. 15-19.

The Montana Supreme Court's decision in *Sleath* does present a conflict insofar as it held, as a general matter, that Section 136v(b) does not preempt state tort actions. *Sleath*,

16 P.3d at 1051-1053. That decision, however, is an anomaly among the large number of federal and state court decisions that have squarely ruled that the term "requirements," as used in Section 136v(b), includes state common law standards of care. See note 4, *supra*. The Montana Supreme Court's ruling was influenced by the United States' filing of two appellate court briefs, in 1999, taking the position that FIFRA does not preempt state-law actions seeking compensation for damages arising from pesticide use. *Sleath*, 16 P.3d at 1047-1048; see U.S. Amicus Br., *Hart* v. *Bayer Corp.*, No. 98-60496 (5th Cir. filed Mar. 1999); U.S. Amicus Br., *Etcheverry* v. *TRI-AG Serv. Inc.*, No. S072524 (Cal. filed Mar. 1999).

As the United States explained in its brief amicus curiae to this Court in *American Cyanamid Co.* v. *Geye*, *supra*, the United States has concluded that the position taken in those lower courts is incorrect. See U.S. Amicus Br. at 17, *American Cyanamid Co.* v. *Geye*, cert. denied, 123 S. Ct. 2637 (2003) (No. 02-367). Because the Montana Supreme Court's anomalous decision rests in part on a position that the United States no longer endorses, that court may wish to reconsider its views. In any event, the conflict between that single state supreme court and a vast body of contrary federal and state judicial decisions has limited practical importance and does not present a matter that requires this Court's resolution at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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